No. 91-72

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION,
Petitioner,
v.
TICOR TITLE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

JOHN C. CHRISTIE, JR.*
PATRICK J. ROACH
BELL, BOYD & LLOYD
Suite 1200
1615 L Street, N.W.
Washington, D.C. 20036
Attorneys for Respondents Ticor Title Insurance Company, Chicago Title Insurance Company, and SAFECO Title Insurance Company (now known as Security Union Title Insurance Company)

* Counsel of Record for Respondents Indicated

JOHN F. GRAYBEAL *
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Post Office Box 389
Raleigh, NC 27602-0389
Attorneys for Respondent Lawyers Title Insurance Corporation

DAVID M. FOSTER *
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Attorneys for Respondent Stewart Title Guaranty Company

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QUESTION PRESENTED

Whether joint rate filings by title insurance rating bureaus, authorized by state law, were "actively supervised" for purposes of the state action doctrine where (1) the state insurance departments had plenary power to review and disapprove the rates, (2) programs of supervision by state regulators were in place, staffed and funded, (3) state laws granted the regulators the power and duty to regulate pursuant to standards that were enforceable in the state courts, and (4) the regulators demonstrated a basic level of activity in carrying out the policies of the states, including reviewing the reasonableness of the filed rates.

RULE 29.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Respondents *Ticor Title Insurance Company, Chicago Title Insurance Company* and *SAFECO Title Insurance Company* (now known as *Security Union Title Insurance Company*) are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary or affiliate of these Respondents has publicly traded common stock.

Respondent *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Universal Leaf Tobacco Company, a publicly-owned corporation. No non-wholly-owned subsidiary or affiliate of Lawyers Title Insurance Corporation has publicly traded common stock.

Respondent *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation. Non-wholly-owned subsidiaries and affiliates of Stewart Title Guaranty Company are listed in the Appendix hereto.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves state-licensed rating bureaus in the title insurance industry that filed rates with state insurance regulators. The Third Circuit correctly held that the bureau rate filings were actively supervised by the states. As a result, their rate filing activity was protected by the state action doctrine.

In January 1985, the Federal Trade Commission ("FTC" or "Commission") initiated an administrative proceeding claiming that title insurance rating bureau activity in thirteen states violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).[1] As

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[1] At the time the administrative complaint was filed, the FTC also was pursuing similar enforcement proceedings challenging

a result of this Court's decision in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985), the FTC dropped five of the original thirteen states and proceeded to an administrative trial alleging violations in the remaining eight.

Almost five years after the filing of the complaint, the FTC, through four commissioners and in four separate opinions, held that the state action doctrine did not protect the title insurers from antitrust liability in six states because the requirements for application of the doctrine set forth in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc. ("Midcal")*, 445 U.S. 97, 105 (1980), were not satisfied. In two states (New Jersey and Pennsylvania), the FTC majority found that the states' regulation was not pursuant to "clearly articulated state policy" because in the FTC's view the state insurance regulators had misinterpreted the scope of their regulatory authority under state law. Petition Appendix ("Pet. App.") at 49a-52a. In the four other states (Arizona, Connecticut, Montana and Wisconsin), the FTC majority found that the state insurance regulators had not "actively supervised" the collective rate filing activity, notwithstanding the conceded existence of regulatory programs and administrative scrutiny of bureau filings. The FTC made a state-by-state examination of whether the state had "actually exercised its authority," Pet. App. at 54a, evaluating whether the state agency "consciously consider[ed] the anticompetitive consequences of the activity for which private parties seek approval," *id.* at 55a. The Commission emphasized that the question was whether the regulator had "meaningfully examine[d]" or "meaningfully regulate[d]" the rate filings. *Id.* at 59a, 62a.

The Third Circuit Court of Appeals reversed and vacated the FTC's Order, finding that the title insurers' rate filings through rating bureaus were protected from federal antitrust liability under the state action doctrine. *Ticor Title Ins. Co.* v. *FTC*, 922 F.2d 1122 (3d Cir. 1991), Pet. App. at 1a-40a. As to the two states in which the FTC found that the state regulators had misinterpreted their statutory authority, the Court of Appeals rejected the FTC's interpretation of state law. It held that the "principles of federalism and state sovereignty" underlying the state action doctrine require an evaluation of how state courts in those states would construe those laws. Pet. App. at 19a, 24a. In light of the intent of those states to broadly regulate title insurers and the consistent construction of state law by the state agencies charged with its enforcement, the Third Circuit found the state regulators' interpretations of their own laws "worthy of our deference." Pet. App. at 20a.

the rate filing activities of motor carrier rate bureaus. *In re New England Motor Rate Bureau, Inc.*, Docket No. 9170; *In re Motor Transport Association of Connecticut, Inc.*, Docket No. 9136.

With respect to active supervision, the Third Circuit determined that the FTC's standard "would in effect, try the state regulator," Pet. App. at 32a, even though the "principles of federalism and state sovereignty that undergird the [state action] doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable." Pet. App. at 37a. The Third Circuit held that, as articulated by this Court, active supervision requires that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Pet. App. at 26a, *quoting Patrick* v. *Burget*, 486 U.S. 94, 100-01 (1988). Applying this principle, the Third Circuit employed the test recently used by the First Circuit in reviewing another of the FTC's rating bureau cases: does the state agency have "the authority to 'review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy,'" and does the agency "review[] the reasonableness of the [filed] rates." *New England Motor Rate Bureau* v. *FTC*, ("*New England*"), 908 F.2d 1064, 1070 (1st Cir. 1990).

Criticizing the FTC's approach as "too demanding in the showing it would require as to the rigor and efficiency of a particular state's regulatory program," the Third Circuit held that a state had exercised its power to control joint rate filing in a state where the following could be shown:

> Where . . . the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

Pet. App. at 28a, *quoting New England*, 908 F.2d at 1071.

Applying this test, the Third Circuit concluded that the active supervision requirement was satisfied in each of the states at issue. Arizona, Connecticut, Montana and Wisconsin plainly had authority to review and disapprove filed rates. The Third Circuit also concluded that the insurance department in each of these four states had exercised its power to control collective rate filing by reviewing the reasonableness of the filed rates under state statutory criteria. In each of the four states there was a program of supervision in place during the relevant time period, staffed and funded. Each of the states granted to its state insurance department ample power and the duty to regulate pursuant to declared standards of state policy, a duty enforceable in the states' courts. Finally, in each of the states the insurance department had demonstrated some basic level of activity directed toward seeing that "the private actors carry out the state's policy and not simply their own policy." Pet. App. at 29a-38a.

The FTC predicates its petition for certiorari upon the Court of Appeals ruling with respect to Montana and Wisconsin. Petition ("Pet.") at 15-17. As to Arizona and Connecticut, while contending that the Court of Ap-

peals erred in its review of the record evidence, the FTC concedes that the purported errors "might not warrant certiorari." Pet. at 20.

REASONS FOR DENYING THE WRIT

The Court of Appeals decision does not warrant review. The decision below reversing the FTC reflects the considered and careful judgment of both the First and Third Circuits regarding the application of the "active supervision" requirement in the context of state authorized rating bureaus. It is faithful to this Court's state action precedent and creates no conflict with decisions of other circuits.

The legal standard argued for in the petition bears little resemblance to the reasoning applied by the FTC in its administrative decision, which was based on a review of whether the states' regulatory supervision was "meaningful," in the opinion of the FTC. The federalism principles that underlie this Court's state action cases required that the Third Circuit reject the FTC's approach. Rather than defending the "meaningfulness" standard, the petition proposes a new standard, under which the state regulator must determine whether the challenged private conduct is "consistent with state policy." Pet. at 10. This new standard is not properly before this Court, and in any event is fully satisfied by the Third Circuit's conclusion that the state regulators in this case reviewed under state law standards the reasonableness of the rates filed by the rating bureaus.

The petition's real challenge is not to the legal standard applied by the Court of Appeals, but rather to the factual basis for the court's conclusion. The record, however, contains ample support for the Third Circuit's decision. A controversy such as this, which is based purely on differing assessments of the facts, is not appropriate for review by this Court.

I. THE THIRD CIRCUIT FAITHFULLY APPLIED THIS COURT'S STATE ACTION PRECEDENT IN REVERSING THE FTC'S ATTEMPT TO REVIEW THE MERITS OF STATE REGULATORY DECISIONS.

As the Third Circuit recognized, this Court's state action jurisprudence "rests on principles of federalism and state sovereignty," Pet. App. at 13a, *quoting 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987). For this reason, this Court has consistently articulated the importance of respect for state decision making in cases involving varying applications of the state action doctrine. *See, e.g., Hoover* v. *Ronwin*, 466 U.S. 558, 574 (1984) ("The Court did not suggest in *Parker* [v. *Brown*, 317 U.S. 341 (1943)], nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely."); *Southern Motor Carriers Rate Conference* v. *United States*, ("*Southern Motor Carriers*"), 471 U.S. 48, 56 (1985) ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."). In its most recent state action decision, this Court, "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect," expressly rejected the notion that the state action doctrine "transform[s] . . . state administrative review into a federal antitrust job." *City of Columbia* v. *Omni Outdoor Advertising*, ("*City of Columbia*") —— U.S. ——, 111 S.Ct. 1344, 1350 (1990), *quoting* P. Areeda & H. Hovenkamp, Antitrust Law § 212.3b, p. 145 (Supp. 1989).

The FTC's approach below to the active supervision requirement runs directly counter to this Court's teachings. The FTC concluded that the critical question was whether the state regulator had "meaningfully examine[d]" or "meaningfully regulate[d]" the rate filings. Pet. App. at 59a, 62a. Using this meaningfulness approach, the FTC discarded any pretense of respect for state decision making, and evaluated the merits and quality of state regulatory decisions. For example, it concluded in Connecticut and Wisconsin that the regulators "could not meaningfully regulate a critical component of the ratemaking process" because they could not directly regulate insurer expenses. *Id.* at 59a, 62a. The Commission found no active supervision with respect to certain rate filings in Arizona and Wisconsin, where the filed rates were based on historical rates that had been produced by market competition, because "accepting prevailing rates is not permissible." Pet. App. at 60a, 64a.

Other judgments concerning the merits of state regulatory decisions and the quality of state regulatory activity permeate the FTC decision. For example, Commissioner Strenio, who authored the majority's decision, concluded in his separate statement that in one instance Connecticut "should have disapproved the rates as excessive." Pet. App. at 132a. He also cited as evidence of an absence of active supervision in Arizona that the state "could not actively supervise the industry for an extended period because it had no qualified personnel," based upon his own prior "rate review experience" as a member of the Interstate Commerce Commission. Pet. App. at 135a.[2]

The Court of Appeals correctly held that the "root of the FTC's error" lay in its "insistence on sitting 'in judgment upon the degree of *strictness* or *effectiveness* with

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[2] Commissioner Azcuenaga, dissenting as to two states, criticized the Commission majority for requiring that the state agency must "consider the anticompetitive consequences of the private acts it is reviewing." Pet. App. at 113a. In her view, that statement "reveal[ed] a fundamental misunderstanding of the state action doctrine." Pet App. at 113a. Commissioner Azcuenaga also said that "the Commission should decline to accept [Commissioner Strenio's] invitation to base our active supervision determinations in part on a review of the resumes of state regulatory personnel." *Id.* at 123a.

which a state carries out its own statutes.'" Pet. App. at 32a, *quoting New England*, 908 F.2d at 1076 (emphasis in original). It characterized the FTC's analysis of the active supervision issue in the following terms:

> The FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal's* adequate supervision prong because the regulators in those states were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable.

Pet. App. at 37a. The Court of Appeals concluded that even if the FTC's evaluation of the quality of regulation were correct, "its conclusions miss the point":

> Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable.

Id.

The First Circuit in *New England* expressed the same reaction to the FTC's similar mode of analysis in that case. In reversing the Commission, the First Circuit stated:

> The FTC's position, at bottom, seems to be that the "active supervision" prong necessitates an inquiry by the FTC into whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator. We think this goes too far.

908 F.2d at 1075. In the view of the First Circuit, by the Commission's standard "the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's action, it would become a means for federal oversight of state officials and their programs." 908 F.2d at 1071.[3]

The Third Circuit decision is entirely consistent with, and indeed is compelled by, the federalism principles articulated in this Court's state action precedent. Last term in *City of Columbia*, this Court refused to create a "conspiracy" exception to the state action doctrine in part because of concern that such an exception would impair the viability of the doctrine by involving antitrust courts in a "deconstruction of the governmental process and probing of official 'intent.'" 111 S.Ct. at 1352. This Court stated that "[a]ll anticompetitive regulation would be vulnerable to a 'conspiracy' charge" and that "such an exception would virtually swallow up the *Parker* rule." *Id.* at 1351. In *Southern Motor Carriers*, this Court determined that the "clear articulation" requirement of the state action doctrine does not mean that state law must compel, rather than merely permit, private entities to behave in an anticompetitive manner, because to rule otherwise would "reduce[] the range of regulatory alternatives available to the State." 471 U.S. at 61. In *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 43 (1985), this Court rejected the argument that the "clear articulation" requirement means that state statutes must ex-

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[3] In *Southern Motor Carriers* this Court acknowledged the legitimacy and usefulness of collective rate filing through rating bureaus as part of a system of state rate regulation. 471 U.S. at 51. The FTC in its petition nonetheless displays overt animosity to this state regulatory alternative, asserting that the present case involves "horizontal price-fixing" that is "even more dangerous [to society] than ordinary price fixing" because of a state agency's monitoring of the "cartel." Pet. at 20-21. This same bias against the states' regulatory choices was reflected in the FTC decision below, as was candidly admitted by Commissioner Azcuenaga in her separate opinion: The "majority's apparent distaste for state-regulated price-fixing, which I share, perhaps carries more weight than it should in the majority's analysis of active supervision." Pet. App. at 113a.

pressly contemplate particular anticompetitive effects, stating that "[n]o legislature can be expected to catalog all of the anticipated effects."

In this case the Third Circuit, following the First Circuit, faithfully applied these principles of federalism to reverse the FTC. The FTC decision demonstrated precisely the "intrusive inquiry into state administrative processes" that the petition now pretends to condemn. Pet. at 11. Moreover, the FTC decision failed to provide any objective standard of active supervision. Such an unstructured and intrusive inquiry leads to "uncertainty among business, consumers, and regulators," in precisely the manner that the petition attributes to the Third Circuit. *Id.* The FTC's unconstrained second-guessing of the wisdom and competence of state regulatory efforts leaves regulated private parties with no guidance concerning whether they may in confidence engage in conduct authorized by state law. This very uncertainty deters private parties from engaging in state-authorized conduct and reduces the range of state regulatory alternatives. *Cf. Southern Motor Carriers*, 471 U.S. at 61.

In contrast to the FTC's freewheeling approach, the standard applied below and by the First Circuit in *New England* focuses on whether the state "has and exercises" power to review the acts at issue. Pet App. at 27a, *citing Patrick* v. *Burget*, 486 U.S. at 102. In assessing whether the state "has" regulatory power, the Third Circuit looked to whether the state agency had the legal authority to review and disapprove filed rates.[4] Pet. App. at 28a. This initial focus of the Court of Appeals test is consistent with the body of cases in this Court and others that have resolved the active supervision issue by inquiring whether state statutes grant authority for substantive

[4] The brief for Amicus Curiae alleges that Montana and Wisconsin do not authorize collective rate filing by rating bureaus. Amicus Brief at 9. The petition makes no such claim and indeed the FTC throughout this proceeding has conceded that joint rate filing was authorized by these states. Pet. App. at 184a.

review of regulated conduct. *E.g. Patrick* v. *Burget*, 486 U.S. at 102; *324 Liquor Corp.* v. *Duffy*, 479 U.S. at 345; *Midcal*, 445 U.S. at 106.[5]

But the standard applied by the Court of Appeals goes further, requiring evidence that the state in fact "exercised" its system of regulation by establishing a staffed and funded program that grants state officials "ample power and the duty to regulate pursuant to declared standards of state policy," and that is "enforceable in the state's courts."[6] Pet. App. at 28a. The existence of an agency with authority to engage in substantive review is by itself a strong indication that the state is acting to see its policy carried out.[7] *New England*, 908 F.2d at 1072.

[5] Lower court cases finding active supervision exclusively on the basis of the existence of a regulatory program include *Capital Telephone Co.* v. *New York Telephone Co.*, 750 F.2d 1154, 1163-64 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985); *Llewellyn* v. *Crothers*, 765 F.2d 769 (9th Cir. 1985); *Marrese* v. *Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Euster* v. *Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982); *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); *Morgan* v. *Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981); *Capital Telephone Co.* v. *Schenectady*, 560 F. Supp. 207, 210-211 (N.D.N.Y. 1983); and *Fisher Foods, Inc.* v. *Ohio Dept. of Liquor Control*, 555 F. Supp. 641 (N.D. Ohio 1982).

[6] The petition questions whether the active supervision requirement is satisfied by the "mere availability of a possible judicial remedy" in the state courts. Pet. at 18. But the existence in this case of staffed and funded regulatory bodies with specific statutory duties makes this issue irrelevant. Unlike *Patrick* v. *Burget*, statutory authority exists here for state agencies to engage in a review of the filed rates for conformance to state policy. *Compare* 486 U.S. at 102. As the Court of Appeals correctly recognized, state legal mechanisms providing for judicial oversight of regulators' actions through mandamus or appellate review provide further assurance that the state, through its regulators, supervises private conduct for conformance to state policy.

[7] The emphasis of the First and Third Circuits on the existence of agency authority is consistent with the presumption of regularity generally afforded under the law to the actions of public

No decision of this Court has ever required more. Nonetheless, the Third Circuit went on to demand evidence showing "some basic level of activity [by the state] directed towards seeing that the private actors carry out the state's policy and not simply their own policy." Pet. App. at 28a, *quoting New England*, 908 F.2d at 1071.[8]

Rather than being a "watered-down" test of active supervision, as the petition argues, the Third Circuit's

officials. In effect, the petition acknowledges that when by statutory mandate state officials must enforce state policy, there does exist "a presumption that [they] have made an affirmative determination that the rate is in accord with state policy." Pet. at 17 and n.6. Although the petition asserts that no such mandate exists in Montana and Wisconsin, *id.*, the statements of statutory purpose and the specific rate provisions of the insurance laws of both of these states require that rates not be excessive, inadequate or unfairly discriminatory, and require the insurance department to enforce the provisions of these statutes. Mont. Code Ann. §§ 33-16-101(1), 33-16-201(1)(a) (1989) ("[r]ates shall not be excessive or inadequate, as defined herein, nor shall they be unfairly discriminatory"); § 33-1-311(1) ("[t]he Commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code"); Wisc. Stat. Ann. §§ 625.01(2)(a), 625.11(1) ("[r]ates shall not be excessive, inadequate or unfairly discriminatory"); § 601.41(1) (West 1980) ("[t]he commissioner shall administer and enforce chs. 600 to 646"). Thus the argument that state officials have unfettered discretion whether to review, or not review, filed rates is refuted by the statutes of both states.

[8] Any test of active supervision which involves an evaluation of the actual activities of state regulators risks, as the Administrative Law Judge at the FTC observed, "laps[ing] over into a qualitative evaluation of the performance of state officials." Pet. App. at 239a. For this reason, it could be contended that the proper test should inquire simply whether a program of supervision has been established by the state, and should eschew any inquiry into the actual activities of state regulators. Though it did not adopt this view, the Court of Appeals, acting in the spirit of this Court's decision in the *City of Columbia* case to protect the viability of the state action doctrine, scrupulously avoided any "qualitative evaluation" of state regulators' conduct.

standard goes beyond this Court's holdings in its effort to give full effect to the language of the *Patrick* case indicating that the state must "have and exercise" regulatory authority over the private conduct. 486 U.S. at 101. In doing so, the First and Third Circuits have crafted a careful approach that permits a focused but deferential inspection of actual state supervision, leaving to the states themselves rather than federal antitrust authorities the responsibility for enforcing state regulatory programs. Such an approach successfully avoids transforming "state administrative review into a federal antitrust job," the result condemned by this Court in *City of Columbia*, 111 S.Ct. at 1344.

II. THE NEW STANDARD PROPOSED BY THE PETITION DOES NOT WARRANT REVIEW IN THIS COURT.

The petition attempts to sidestep the federalism problems inherent in the FTC's decision. It contains no defense of the meaningfulness standard used by the FTC to justify its intrusive scrutiny of state regulation. Instead, it proposes a new and quite different standard —neither applied in its own decision nor presented in its brief in the Court of Appeals. Under the petition's standard, in order to actively supervise, state officials must "determine[] whether particular prices . . . are consistent with State policy." Pet. at 10. This vacillation by the FTC suggests that it does not know what standard of active supervision it wishes to embrace.

This Court should decline consideration of this new standard in this case, where the FTC is unwilling to defend the legal rationale that it employed in reaching its administrative decision. The Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). *See generally* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Prac-*

tice § 6.26 at 364 (6th ed. 1986). This rule applies with particular force here. By putting forward in its petition a legal standard that has never been applied according to its terms, the petition raises obvious ripeness concerns. *See, e.g., Chemical Manufacturers Association* v. *EPA*, 870 F.2d 177, 233, *modified on other grounds*, 885 F.2d 253 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1936 (1990). The Commission's abandonment of the standard it actually applied also violates the principle of administrative law that an agency may not on appeal change the original rationale for its conclusions. *See, e.g., FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986).

Even if the new standard proposed in the petition were properly in issue, it would not strengthen the argument for review by this Court. The application of the active supervision requirement here would not be materially affected by substituting the petition's formulation for the standard adopted by the First and Third Circuits. The petition argues that the Court of Appeals decision should be reviewed because it found active supervision "where state officials do not determine whether the prices meet the State's regulatory criteria." Pet. at 17. But the Court of Appeals concluded that in each of the states at issue, the state regulators in fact "reviewed the reasonableness of the title insurance rates" pursuant to the standards of reasonableness set by state law.[9] Indeed, the petition itself refers to this conclusion. Pet. at 7, 8. This conclusion by the Court of Appeals concerning the activities of the state regulators in this case would appear to satisfy precisely the new standard now urged by the petition.

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[9] Each state at issue was found by the Court of Appeals to have satisfied the second factor articulated in the *Midcal* and *324 Liquor* cases, that "the state reviews the reasonableness of the rates." Pet. App. at 31a (Arizona), 33a (Connecticut), 35a (Montana), and 37a (Wisconsin).

III. THE PETITION RESTS ON DISPUTES OF FACT THAT ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The petition in reality invites this Court to provide a second level of judicial review of the voluminous record in this case. The petition asks the Court to re-evaluate the *factual* basis for the Court of Appeals finding of active supervision. This Court should decline to do so.

The factual character of the FTC's arguments is apparent at the most fundamental level. The issue framed by the petition is whether active supervision can exist where the state regulators "do not determine whether the [filed rates] meet the State's regulatory criteria," Pet. at I. But the petition concedes that the Court of Appeals in fact concluded that the state regulators "review[ed] the reasonableness of the title insurance rates," pursuant to their statutory authority. *Id.* at 7, 8. Thus the very question presented in the petition rests on a factual dispute between the FTC and the Court of Appeals.

The factual character of the FTC's arguments is also reflected by the FTC's earlier failure to seek certiorari to review the Court of Appeals standard when it was originally articulated in the *New England* case. The petition makes clear that the FTC's hostility to the standard in this case is attributable to what the FTC views as different factual circumstances in the two cases. Pet. at 15, n.5.

Finally, the factual nature of the FTC's objection to the Third Circuit's decision is apparent from its attempt to differentiate among the states at issue on the active supervision question. The petition does not argue that the Court of Appeals applied different legal standards to the various states, but it seeks certiorari only as to Montana and Wisconsin, arguing as to Arizona and Connecticut merely that the Court of Appeals "refus[ed] to accept the Commission's appraisal of the evidence." Pet. at 20.

The petition's real complaint is not the legal standard applied by the Third Circuit, but the factual basis for the court's conclusions. Thus it alleges that there is not "a sufficient factual basis" for the Third Circuit's conclusions regarding Wisconsin, and recites a small part of the factual background of both Wisconsin and Montana. Pet. at 15-16. Fact-oriented issues of the character raised by the petition are not appropriate for review in this Court. "We do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *see Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984).

Indeed, the administrative record, as established in the findings made by the administrative law judge and in the uncontested record evidence, contains abundant evidence to show that in both Montana and Wisconsin the regulators acted to review the filed rates for conformance to state policy. Only by perpetuating the principal error of the FTC decision below and making *qualitative* judgments about the regulators' actions can the petition argue that their actions did not constitute "supervision" for conformance to state policy.

A. Montana.

In Montana the rating bureau obtained its license in July 1982 and was defunct by the end of 1984. It made one major rate filing in February 1983. As regards this filing, the ALJ's finding, which was accepted by the Commission, was that "a representative of the Montana rating bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form of financial data showing the profitability of agents and insurance companies for the past five years." Pet. App. at 213a. At the administrative hearing the witness who was present at this meeting with the regulators testified as follows:

> We took a look at the filing, discussed the filing for a while, talked about its contents and discussed also what type of justification they [the state] would want as far as statistics.

Tr. 2858.

The record shows that the regulator's request for additional information made at the meeting was to supplement the information contained in a five-page, single-spaced letter which was submitted in support of the rate filing. CX 41A-41E. That letter presented extensive revenue, expense and profitability data for the title insurance industry on a nation-wide basis, for the express purpose of demonstrating that the filed rates conformed to the Montana statutory rate criteria. CX 41A. Among other things, the letter pointed out that the industry nationally had incurred substantial losses in the real estate recession of 1980, 1981 and in the first half of 1982, and that these business conditions had direct implications for the solvency of title insurers. CX 41B-41D. The letter proposed development of a method of statistical data collection which would provide Montana-specific information on industry profitability in further support of the filed rates, CX 41E, though it noted that Montana accounted for somewhat less than ¼ of one percent of the revenue of the title insurance industry nationwide, CX 41A. This statistical data collection was later undertaken, but before the consultant hired by the rating bureau could complete his work, most members of the rating bureau had resigned from the organization. Tr. 2857, 2868.[10]

[10] In Montana there also had "been a history of state involvement in the controlled business and agent commission problems" in the title insurance industry leading ultimately to specific state legislation on these subjects. Pet. App. at 242a. The record also shows that the Montana Insurance Department was an active participant on a task force formed by the National Association of Insurance Commissioners to study the title insurance industry which ultimately led to a Model Title Insurance Act, subsequently adopted by Montana. RX 502Z-44; RX 502Z-103; RX 502Z-120.

On this record and his own fact findings for Montana, the ALJ found "inadequate basis in the record for questioning state supervision during the brief existence of the rating bureau." Pet. App. at 242a. The rate filing was reviewed and approved by the state regulator. Indeed the copy of the rate filing introduced by the FTC in the administrative hearing bears a "reviewed and filed" stamp by the regulator, CX 41A, and the petition itself admits that the state regulator, after discussing the supporting information submitted with the filing, affirmatively "told the [title insurers] that the collective rates would go into effect immediately." Pet. at 16. Only by concluding that the review and approval by the Montana regulator was qualitatively insufficient can the petition now argue that "Montana made no judgment that [the filing] furthered state policy." *Id.* By pressing this argument in the petition, the FTC perpetuates the erroneous view permeating its decision below that it may sit in judgment of the quality of state regulators' actions.

B. Wisconsin.

The Wisconsin rating bureau submitted general rate filings in 1971, 1981 and 1982, as well as various endorsement filings. The ALJ's findings with respect to the 1971 Wisconsin filing were as follows:

> In response to the 1971 filing, the Office of the Commissioner raised some questions about the bureau's reasons for limiting search and examination charges to the southeastern counties of the state only. The issue was eventually resolved by the publication of state-wide search and examination charges. The 1971 rates, which represented historical rates charged before the formation of the bureau, *were approved* although supporting justification was not provided until 1978.

Pet. App. at 197a-198a (emphasis added). The uncontradicted record evidence shows that before the regulators

approved the 1971 filing there was the following activity: rating bureau members met with officials of the insurance department prior to the 1971 filing (RX 302, Tr. 1619-1620); the department indicated that it would carefully review the filing (RX 302, Tr. 1621); the department responded to the filing indicating that the rates were "acceptable" but requesting additional information (RX 303, Tr. 1623, 1625); the department rejected the explanation that was offered by the rating bureau (RX 312, Tr. 1626).[11]

The uncontroverted record with respect to the 1981 and 1982 filings similarly demonstrates substantial regulatory attention. After receipt of the 1981 filing, the insurance department analyst determined that it involved a rate increase of "approximately 11 percent." Tr. 1751. He "discussed it with [his] supervisor" and told him that "it would be wise for us to look at it closely." Tr. 1750. The supervisor "agreed with [his] opinion" and told the analyst "to go through it from head to toe." Tr. 1751. Thereafter, the analyst checked the filing for mathematical accuracy, checked it against the financial and statistical information collected from the title insurance

[11] After approving the 1971 rate filing on grounds that the rates reflected existing title insurance rates, the department followed up on its activities. It pursued the rate justification issue again with the bureau in 1973 and meetings were held in July 1973 and March 1974 to discuss the matter. (RX 305-307, 309-309A). The department in 1974 formally requested submission of statistical information (RX 316); it held hearings in February and April 1975 to discuss rate justification and other title insurance issues (RX 320-320E, Tr. 1634). The proposed data collection system designed for the bureau by the Arthur D. Little consulting firm was submitted to the department by letter in August 1976. RX 334-334Z-19; Tr. 2587-2588. Bureau personnel met with department personnel in September 1976 to discuss the data collection systems (RX 336-336B, RX 340); the plans were officially submitted to the department in November 1976 and the department acknowledged the filing of the plans in January 1977 (RX 340, 341).

industry, checked it against the annual statements of the title companies and "adjusted the rates at different levels to see how different rate increases would amount residential versus commercial [sic] and played with different kinds of rates and so forth." Tr. 1752. Under questioning by the ALJ, the analyst testified that he "looked at the submission by the rating bureau very carefully because it was a substantial one." Tr. 1824. Insurance department personnel met with rating bureau representatives in May and July 1981 to request further information and discuss the filing. RX 369-369A; Tr. 1646-47, 1710, 1755-56, 1713.

The analyst compared the 1981 proposed rates with rates that were in effect in Minnesota and Illinois. Tr. 1825. Although he thought there were "grounds to attack" the filing and that there were some "weaknesses in it," he "went through a weighing and judgmental process" and "came to the conclusion that it was justified." Tr. 1824-25. He testified that he "gave the 1981 filing an intensive review." Tr. 1799. Thereafter, the analyst informed the president of the Wisconsin rating bureau that the department accepted the 1981 filing. Tr. 1714.

The Wisconsin rating bureau made another rate filing in 1982. In discussions with bureau representatives before the filing was submitted, the Wisconsin rate analyst stated, "[I]f you are talking about rate increases, you better be prepared to justify them." Tr. 1715. The analyst stated "that other members of the staff were reviewing [the rate filing]" (Tr. 1719), and he could "say with certainty [that he] reviewed the filing." Tr. 1757. After his review, he requested additional information from the rating bureau (RX 377, Tr. 1719-1720, 1757) which was submitted. The filing was later accepted. RX 378.

Once again, only by making a *qualitative* judgment concerning the regulatory activities of the state officials can the FTC argue that Wisconsin did not "review the

reasonableness of the rates established by the respondents." Pet. at 16. The finding in the FTC decision that the filings were checked "merely for mathematical accuracy," Pet. at 63a, mischaracterizes the record. The uncontroverted record contains abundant evidence of affirmative action by Wisconsin to review and approve the filed rates.

C. Arizona and Connecticut.

As to the other two states where the active supervision requirement was in issue (Arizona and Connecticut), the petition argues that the Court of Appeals erred by refusing "to accept the Commission's appraisal of the evidence," but does not contend that this purported error warrants certiorari. Pet. at 20. The petition is at least correct in this concession; such a fact-specific question is plainly not appropriate ground for review. Moreover, no "substantial evidence" issue arises from the refusal of the Third Circuit to defer to the FTC's conclusion that there was a failure of active supervision in these two states. The FTC's conclusion resulted from erroneous application of its meaningfulness standard, tainted by the view that in assessing the existence of state supervision it could make its own evaluation of the quality of state supervision.[12] The Third Circuit did not reject the Commission's factual findings, but rather found that they "miss[ed] the point" that the quality of state supervision does not determine the applicability of the state action doctrine. Pet. App. at 37a.

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[12] The Commission's lack of objectivity in these states was the subject of comment even by one of the Commissioners. In her dissent, Commissioner Azcuenaga observed that "the majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies." Pet. App. at 125a. In her opinion, "[t]he majority's reading of the evidence and application of the state action doctrine loads the dice heavily against the respondents." *Id.*

CONCLUSION

For all these reasons, the case is not appropriate for review, and the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN C. CHRISTIE, JR.*
PATRICK J. ROACH
BELL, BOYD & LLOYD
Suite 1200
1615 L Street, N.W.
Washington, D.C. 20036
Attorneys for Respondents Ticor Title Insurance Company, Chicago Title Insurance Company, and SAFECO Title Insurance Company (now known as Security Union Title Insurance Company)

* Counsel of Record for Respondents Indicated

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JOHN F. GRAYBEAL *
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Post Office Box 389
Raleigh, NC 27602-0389
Attorneys for Respondent Lawyers Title Insurance Corporation

DAVID M. FOSTER *
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Attorneys for Respondent Stewart Title Guaranty Company

APPENDIX

SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES) AND AFFILIATES OF STEWART TITLE GUARANTY COMPANY

American Surveying of New England
American Surveying of Texas
Associated Abstract Agency, Inc.
Bacalandata, Inc.
Blaine County Title
Citizens Title & Trust
Environmental Information Systems
Fleetwood Management Corporation
Intercounty Abstract Co. d/b/a
Stewart Title of New Hampshire
Island Title Corporation
Island Title Exchange, Inc.
Landata Inc. of Illinois
Landata Inc. of New England
Landmark Title, Inc.
Landmark Title Services Corporation (Denver)
Landmark Title Services Corporation (Colorado Springs)
Meyerdirk Title Co. (Kansas)
Nacogoches Abstract & Title Company
O'Rourke Title Co.
Old California Title Company
Peoples Title Agency, Inc.
Property & Equipment Management Service
SIT Investment Corp.
Stewart Escrow & Title Services of Lawton
Stewart-Fidelity Title Company
Stewart Holding Company
Stewart Metro Title Corporation
Stewart of Bayshore
Stewart of Lubbock, Inc.
Stewart-Princeton Abstract
Stewart Tax Service

Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
Stewart Title Agency of Bergen County
Stewart Title Agency of No. Jersey, Inc.
Stewart Title Agency of Ohio, Inc.
Stewart Title Company of Contra Costa
Stewart Title Company of Michigan
Stewart Title Company of Minnesota
Stewart Title Co. of Palestine
Stewart Title Delaware, Inc.
Stewart Title of Aspen, Inc.
Stewart Title of Birmingham, Inc.
Stewart Title of Central Jersey, Inc.
Stewart Title of Clearwater, Inc.
Stewart Title of Columbia
Stewart Title of Eagle County
Stewart Title of Fort Lauderdale, Inc.
Stewart Title of Fort Meyers, Inc.
Stewart Title of Fresno County
Stewart Title of Greater Washington, Inc.
Stewart Title of Greeley, Inc.
Stewart Title of Indianapolis, Inc.
Stewart Title of Modesto
Stewart Title of Montgomery County, Inc.
Stewart Title of Northern Nevada
Stewart Title of Oregon
Stewart Title of Pennsylvania, Inc.
Stewart Title of Rhode Island, Inc.
Stewart Title of Rockport, Inc.
Stewart Title of San Patricio County, Inc.
Stewart Title of Sarasota
Stewart Title of Tampa
Stewart Title of Virginia
Stewart Title of Western Suburbs, Inc.
Stewart Title Orange County
Texarkana Title & Abstract Co., Inc.
Title Pro, Inc.
Unique Exchange, Inc.